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8

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12 IN RE CISCO SYSTEMS, INC. SECURITIES
LITIGATION

Case No. C 01-20418 JW (PVT)

13 **NON-PARTIES MICHAEL BROOKS' AND**
14 **SOLECTRON CORPORATION'S NOTICE**
15 **OF MOTION AND MOTION FOR**
16 **IMPOSITION OF MONETARY**
17 **DISCOVERY SANCTIONS AGAINST**
18 **PLAINTIFFS' COUNSEL**

19 Date: February 24, 2006
Time: 8:15 a.m. (*Via Telephonic*
Hearing)
Location: JAMS – San Francisco
Hon. Edward A. Infante
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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 Please take notice that, on February 24, 2006 at 8:15 a.m. by telephonic hearing, or as soon
4 thereafter as counsel maybe heard at JAMS' San Francisco Office, located at Two Embarcadero
5 Center, Suite 1100, San Francisco, California, non-parties Michael Brooks ("Brooks") and
6 Solectron Corporation ("Solectron") hereby move the Court for an order imposing monetary
7 discovery sanctions against Plaintiffs' counsel of record, Lerach Coughlin Stoia Geller Rudman &
8 Robbins, LLP, for their refusal to withdraw a defective trial subpoena.

9 The motion for imposition of monetary discovery sanctions against Plaintiffs' counsel of
10 record, Lerach Coughlin Stoia Geller Rudman & Robbins, LLP, is made pursuant to FRCP
11 45(c)(1) on the grounds that "[s]anctions are properly imposed and attorney's fees are awarded
12 where, as here, the party improperly issuing the subpoena refused to withdraw it, requiring the
13 non-party to institute a motion to quash." *Night Hawk Limited v. Briarpatch Limited, L.P.*, No. 03
14 CIV. 1382, 2003 WL 23018833, *9 (S.D.N.Y. December 23, 2003).

15 This motion is based upon this notice of motion, the attached memorandum of points and
16 authorities in support thereof, the declaration of Donald P. Gagliardi, Mr. Brooks' and Solectron's
17 Motion to Quash Trial Subpoena and the supporting declaration of Mr. Gagliardi, each filed
18 concurrently herewith, the complete court files and records, and such further evidence and
19 argument as may hereinafter be presented.

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. INTRODUCTION AND BACKGROUND**

22 On September 28, 2005, Plaintiffs' counsel purported to serve on non-party Michael
23 Brooks a Trial Subpoena in this matter. The Trial Subpoena was defective *inter alia* because
24 Plaintiffs' counsel failed to simultaneously provide the legally-required per diem witness or
25 mileage fees. In conjunction with this motion for imposition of monetary discovery sanctions
26 against Plaintiffs' counsel, Michael Brooks ("Brooks") and Solectron Corporation ("Solectron")
27 (collectively, "Non-Parties") filed a Motion to Quash the Trial Subpoena ("Motion To Quash"),
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1 which is hereby incorporated by reference. Pursuant to Civil Local Rule 7-8, Non-Parties
 2 separately move for the imposition of sanctions related to Plaintiffs' counsel's refusal to withdraw
 3 the Trial Subpoena.

4 Counsel for Non-Parties have met and conferred with Plaintiffs' counsel in an attempt to
 5 have Plaintiffs' withdraw the defective subpoena, to no avail. Accordingly, Mr. Brooks and
 6 Solelectron seek the imposition of monetary discovery sanctions against Plaintiffs' counsel of
 7 record, Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP. *Night Hawk Limited v.*
 8 *Briarpatch Limited, L.P.*, No. 03 CIV. 1382, 2003 WL 23018833, *9 (S.D.N.Y. December 23,
 9 2003).

10 **II. ARGUMENT**

11 **A. Plaintiffs' Counsel Should be Monetarily Sanctioned for Misuse of the** 12 **Discovery Process by Refusing to Withdraw an Obviously Defective Subpoena.**

13 Federal Rule of Civil Procedure 45(c)(1) provides that:

14 A party or an attorney responsible for the issuance and service
 15 of a subpoena shall take reasonable steps to avoid imposing
 16 undue burden or expense on a person subject to that subpoena.
 17 The court on behalf of which the subpoena was issued shall
 18 enforce this duty and impose upon the party or attorney in breach
 19 of this duty an appropriate sanction, which may include, but is not
 20 limited to, lost earnings and a reasonable attorney's fee.

21 *Id.*

22 Further, sanctions are properly imposed and attorney's fees awarded where the party
 23 improperly issuing the subpoena refused to withdraw it, requiring the non-party to institute a
 24 motion to quash. *Night Hawk Limited v. Briarpatch Limited, L.P.*, No. 03 CIV. 1382, 2003 WL
 25 23018833, *8-9 (S.D.N.Y. December 23, 2003).

26 In this instance, Plaintiffs' counsel failed to tender the required witness and mileage fees
 27 when Plaintiffs purported to serve the Trial Subpoena on Mr. Brooks. *CF & I Steel Corp. v.*
 28 *Mitsui & Co.* 713 F. 2d 494 (9th Cir. 1983). Counsel for non-parties Michael Brooks and
 Solelectron repeatedly advised Plaintiffs' counsel of the defect and requested that the subpoena be

1 withdrawn.¹ Despite being aware of the existence of clearly established Ninth Circuit law
 2 showing the Trial Subpoena is defective, Plaintiffs' counsel has refused to withdraw the defective
 3 Trial Subpoena. (Gagliardi Decl. Motion To Quash, ¶ 23, Ex. T). The actions of Plaintiffs'
 4 counsel are clearly unreasonable and run afoul of the spirit and intent of FRCP 45(c)(1).
 5 Accordingly, the imposition of monetary discovery sanctions against Plaintiffs' counsel is
 6 appropriate. *Night Hawk Limited v. Briarpatch Limited, L.P.*, No. 03 CIV. 1382, 2003 WL
 7 23018833, *9 (S.D.N.Y. December 23, 2003). Non-Parties request as a sanction reimbursement to
 8 their attorney's fees incurred on the Motion to Quash. (See Declaration of Donald P. Gagliardi in
 9 Support of Motion For Imposition Of Monetary Discovery Sanctions Against Plaintiffs' Counsel,
 10 ¶ 2).

11 **III. CONCLUSION**

12 Based on the foregoing, non-parties Michael Brooks and Solectron respectfully request
 13 that this Court enter an order imposing monetary discovery sanctions against Plaintiffs' counsel of
 14 record, the law firm of Lerach Coughlin Stoia Geller Rudman & Robbins, LLP, for misuse of the
 15 discovery process by refusing to withdraw an obviously defective subpoena.

16 Dated: December 1, 2005

BERGESON, LLP

18 By: _____ /s/

Donald P. Gagliardi

Attorneys for Non-Parties
 MICHAEL BROOKS and SOLECTRON
 CORPORATION

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 24 ¹ Plaintiffs' counsel was further advised that the Trial Subpoena placed an undue burden on Mr.
 25 Brooks, as it required him to travel over 100 miles from his residence and place of employment to
 26 testify at trial. Moreover, Mr. Brooks' appearance at trial is completely unnecessary as Plaintiffs
 27 preserved his September 28, 2005 deposition testimony on videotape.
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